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No. 223

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. —.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

THOMAS M. PATTERSON, PLAINTIFF IN ERROR.

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON The Relation of N. C. Miller, Attorney General of the State of Colorado, Defendant in error.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF PLAINTIFF IN ERROR.

HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
JAMES H. BLOOD,
HARVEY RIDDELL,
S. W. BELFORD,
JOHN A. RUSH,
RICHARDSON & HAWKINS,
Attorneys for plaintiff in error.

BARR BY BYRON-STATE PRINTING & ENGRAVING CO. WASHINGTON, D. C.

IN THE

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ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

On June 24, 25, 26, 27, 28, and 30, there were printed in the daily Rocky Mountain News and the Denver Times, both daily newspapers, published at Denver, Colorado, certain articles and a cartoon which formed the basis of a prosecution against plaintiff in error for allegd contempt of the Supreme Court of Colorado. These papers were published by the News-Times Publishing Company, a corporation, in which the respondent Thomas M. Patterson was the principal stockholder. He was also the responsible editor of these papers and controlled their utterances.

(Plaintiff in error will be in hereafter referred to as respondent.)

The Supreme Court of Colorado determined that these articles were contemptuous of their body and the Chief Justice

of the Court and Mr. Justice Goddard sought the chairman of the grievance committee of the State Bar Association and requested him to call the committee together to recommend that proceedings in contempt instituted against the respondent by reason of the cartoon and articles. The Committee was convened and adopted the following resolution:

> "The greviance committee of the Colorado Bar Association, having examined certain articles which have appeared during the current week in the Rocky Mountain News and Denver Times, *tending* to bring into disrespect the Suprem Court *or* some of the judges thereof in connection with the decision of the so called county officers cases, believs that *some* of said articles contain matters of sufficient importance *to justify an inquiry by contempt proceedings* against the person responsible for their publication." (Rec. folio 130, 131.)

On the third day of July, 1905, N. C. Miller, Attorney General of the state filed in said court what he termed an information, which was unverified. This information set forth the cartoon and articles in full. The bodies of the articles were interpolated with innuendoes, the effect of which was, (but we contend wholly through the innuendoes) to cause the articles to charge that the Supreme Court of Colorado and certain of its judges were corrupt and had been and would be corruptly influenced in the decision of certain cases pending in said court and entitled and numbered in the said information. It further charged that by reason of said articles respondent had been and was guilty of contempt against said court and its judges and it prayed for a citation to require respondent to show cause on a day certain why he should not be punished for contempt..

No citation was ever issued for, or served upon the Publishing Company. The citation was issued, and October 23, 1905, was named as the day on which respondent was to appear and show cause.

Prior to the return day and on the 20th day of October,

1905, a notice in writing was served upon respondent, which notice is as follows:

> "To the News-Times Publishing Company, a corporation, and Thomas M. Patterson, respondents in the above entitled matter:
>
> "You and each of you are hereby notified that I shall on Saturday, October 21, 1905, at 10 o'clock A. M. or as soon thereafter as counsel can be heard, ask leave of the Honorable Supreme Court of the State of Colorado, or the judges thereof, to file an affidavit verifying the information heretofore filed in the above entitled cause. Said motion will be presented in the chambers of the Honorable Chief Justice of said court.
>
> N. C. MILLER,
> *Attorney General.*"
> (R. folio 149.)

Respondent, through his attorneys, appeared before the Chief Justice in Chambers at the time stated in the notice whereupon the following occurred:

> "Thereupon the said attorney for respondent announced that *he appeared specially for the purpose of objecting to any order being made permitting the filing of said affidavit, and for no other purpose,* and that he objected to the filing of said affidavit on the ground that an affidavit was a necessary prerequisite to the issuance of the rule to show cause, and that the defect or invalidity of the proceedings could not be cured by a later filed affidavit, and also on the ground that said affidavit was made upon information and belief, and was therefore insufficient.
>
> "Thereupon the said Chief Justice made and ordered to be entered of record an order that said affidavit be permitted to be filed without prejudice to the said respondent, to raise the question as to the right to file the said affidavit and the sufficiency thereof, by motion to quash the information herein and to quash the information herein as thus verified." (R. folio 151.)

The motion was granted over respondent's objection and exception duly made at the time.

The body of the affidavit filed by the Attorney General under the permission then granted is as follows:

> "N. C. Miller, being first duly sworn, deposes and says: That he is Attorney General of the State of Colorado and that the allegations made by him as Attorney General in the information filed in the above entitled cause in the Supreme Court of the State of Colorado on the 30th day of June, 1905, are true to the best of his knowledge and belief." (R. folio 150.)

On return day, October 23rd, respondent, through his attorneys, filed a motion to quash the writ and information, the causes set forth being as follows:

First: That said information and this prosecution against respondent is in violation of and contrary to section 10 of article II of the Constitution of the State of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the directions of the court, shall determine the law and the fact.

Second: That said information, and this prosecution against respondent, is in violation of and contrary to section seven of article II of the Constitution of the State of Colorado, and particularly that part of said section which provides that no warrant to sieze any person shall issue without probable cause supported by oath or affirmation reduced to writing.

Third: That said information and this prosecution against respondent is in violaiton of and contrary to section 25 of article II of the Constitution of the State of Colorado, which provides that no person shall be deprived of life, liberty and property without due process of law.

Fourth: That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law.

Fifth: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt.

Sixth: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court, or of any judge or judges of said court.

Seventh: That the said information on which the rule to show cause was issued was and is an unverified information. That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause, was as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rule or to require respondent to answer or show cause herein.

Eighth: That the affidavit of N. C. Miller, attorney general which was filed in this cause, was filed on October 21, 1905, and after the filing of the information and the issuance of the rule to show cause, and is made only upon information and belief and does not give the court jurisdiction to proceed with this cause, and said affidavit is of no effect or validity.

Ninth: That the said information and the allegations and statements therein contained show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt. (R. 152-154.)

Subsequently, on October 30, 1905, the motion was argued, and on November 13, 1905, it was overruled, and respondent Patterson was ordered to file his answer in the cause on or before November 20, 1905.

To which ruling of the court, overruling said motion and requiring respondent to answer etc. Respondent by his counsel then and there excepted. (Folios 155-6.)

At the time fixed respondent filed his answer. The answer as did the motion to quash, set forth the grounds why under the Constitution of the United States and the constitution of the State of Colorado the court was without jurisdiction to issue the citation, adjudge him guilty of contempt or to imprison or fine him for the alleged contempt. So much of the answer as sets forth the violation of the fourteenth amendment to the Constitution of the United States, by reason of the information and prosecution thereunder of the respondent is as follows:

> "That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides hat no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the law: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court of Colorado or of any judge or judges of said court; That the said information on which the rule to show cause was issued was an unverified information: That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause was as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was, and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rules or to require respondent to answer or show cause therein. That the said information, and the allegations and statements therein contained, show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt.
>
> "That the common law has been adopted in this state only by virtue of express legislative act, and only

to the extent suitable to our condition; that the growth of constitutional liberty has abolished arbitrary power of courts to inflict punishment and penalties upon persons commenting upon courts and judges, or upon the character thereof, through contempt proceedings, and the right to make any such comment upon courts and judges, in any respect, and as fully and freely as may be desired, is a right of every person, and is a right reserved to the people without any express reservation, as provided in article II, section 28, of the Constitution of this state.

"And the respondent avers that to state the truth is not and cannot be a criminal contempt of this Honorable court, and he avers, upon information and belief that the allegations and statements in the said published articles for which he is arraigned, omitting the innuendoes inserted therein, in the information, by the attorney general, are true, and this respondent especially sets up and claims, under the Constitution of the United States, and under the Constitution and laws of Colorado, the right and privilege of introducing witnesses to prove the truth of the said allegations, averments and statements in the said published article contained, and of the things set up herein as his justification and defense. All of which matters and things hereinabove contained this respondent stands ready to maintain and prove, and of this he puts himself upon the country." (R. folio 134-136.)

The foregoing, with a detailed statement of facts which clearly sets forth the doings and transactions with which members of the court had been connected, decisions by the court violently contradictory of each other as to the matters set forth, usurpations by the court of the powers and functions exclusively belonging to the legislative and executive departments of the government, decisions and actions by the court that were revolutionary and subversive of republican government in the state, and certain matters that justified a charge of corrupt doings by certain members of the court, make up the answer filed by respondent to show cause why he had not been guilty of contempt.

Respondent contends that the articles themselves did not charge corruption upon the court or its judges, but, that the

Attorney General in setting forth the articles in the information, interpolated them with many innuendoes which averred that the language charged corruption, partisan bias and corporation control of the court and the judges; and respondent being required to meet the articles as thus interpolated and construed, the answer beforementioned was prepared and filed.

The answer is found in the record commencing on page 20, folio 44 continuing to page 63, folio 137 of the record, and is verified by the respondent.

This answer was carefully considered by the respondent and every one of the attorneys who signed it. Each of the attorneys signed it in person and after full knowledge and consideration of its charges.

By reason of the character of the answer, the extraordinary nature of its contents, the offenses charged and the exposures made in it, with the serious consideration it required from and the responsibility assumed by the attorneys in affixing their names to it we may ask the court to carefully read it, conscious that it will feel that only a high sense of duty to the public with which both respondent and the attorneys have been and are officially and otherwise intimately associated would have led them to file the document.

Upon the filing of the answer the attorney general filed the following motion:

After title of the cause:

> "Comes now N. C. Miller, as Attorney General of the State of Colorado, and moves the consideration of the information and answer, heretofore filed in the above entitled cause, and that the court order a writ of attachment to be issued for the arrest of Thomas M. Patterson, respondent therein, and that he—brought forthwith before the bar of this court, that it may be inquired of him if anything further he has to say why he should not be found guilty as charged in said information, and be punished accordingly." (R. folio 156-157.)

The meaning and effect of this motion was not understood by respondent or his counsel, but on the following day, Novem-

ber 24, the Attorney General with Charles S. Thomas and Horace N. Hawkins, of respondent's attorneys, appeared before the Chief Justice with reference to it. The Attorney General read the motion and stated concerning it: "This is not a demurrer it is a motion practically for judgment upon the pleadings. *In this particular case the proceeding is somewhat novel.* The answer is filed following a citation issued to the respondent and *was filed under oath in direct response to the citation and information.* I have had some doubts in my own mind whether it would be proper to make a motion to strike, but I believed that a motion to strike was an improper one and this was better than a demurrer to the answer because it reached the entire proceeding presented to the court; that is the entire pleadings presented to the court. *I have grave doubts in my own mind whether in any strictly contempt proceedings a citation can issue requiring the respondent to answer of his own conscience as to the reason why a certain article is published,* that any person has a right to strike that from the files and prescribe a different paper in its stead. So acting upon my own judgment in this case we have filed this motion."

Subsequently and on the day following respondent, by his counsel filed the following motion:

> "Comes the respondent, Thomas M. Patterson, and moves the court that the Attorney General be required to make the motion filed in this cause on Friday, November 24th, 1905, and which has been set for hearing on Tuesday, November 28th, 1905, more specific and definite, so that the respondent may be informed what the object or purpose of said motion is and what is to be heard on said date. And respondent says that said motion simply says that the attorney general *"moves the consideration of the information and answer heretofore filed in the above entitled cause."* That said motion is indefinite and uncertain, so that it cannot be ascertained therefrom whether the attorney general claims that there should be a judgment on the pleadings or whether the court is asked to try and dispose of the cause upon the issues of fact. And respondent says that if said motion is not a motion for judgment on the pleadings, but is an application for trial of the

> issues of fact in said case, then he prays that an order be made and entered permitting the respondent to have the process of this court to compel the attendance of witnesses on the trial of the issues of fact therein, and that the clerk be directed to issue subpœnas as requested by the respondent." (R. folio 163.)

Again the attorney general and respondent's counsel appeared before the Chief Justice for the purpose of the above motion, when the attorney general, with the assent of the Chief Justice, stated that his motion was "for all intents and purposes a motion for judgment on the pleadings," (all of which is set forth in the bill of exceptions. (R. folios 157-169.)

On November 28, 1905, said motion for judgment on the pleadings came up and after argument the court took it under advisement, and on the following day the following proceedings were had—quoting from the record:

> "And thereupon the court, through Chief Justice Gabbert, made the following ruling:
> "In 5681 entitled The People *ex rel* against the News-Times Publishing Company and Thomas M. Patterson, respondents, the motion of the Attorney General for judgment on the pleadings is sustained and respondent, Thomas M. Patterson is adjudged guilty of contempt as charged in the information filed.
> "Have counsel or the respondent anything to say why judgment should not be pronounced on the finding of guilty of contempt?"

The respondent, Thomas M. Patterson, in answer to the question of the court as to why judgment should not be pronounced upon the finding that he was guilty of contempt, then said:

> "I feel if your honors please, that, without having the slightest idea what punishment the court will inflict under the circumstances of this very peculiar case I should say something why I should not be punished for contempt.
> "Certain articles were published in the News and Times for which the writing or publication, or both, I was and am responsible.

"The chief justice, in his own way, saw fit to initiate contempt proceedings by reason of these articles, and as a result of his steps the attorney general filed this information, commanding that I should show cause why I should not be punished for contempt, the allegations of the information being that these articles were contemptuous of the supreme court and certain if its judges.

"The court can rest assured that when that information and citation were served upon me I was confronted with perhaps as serious a situation as I have ever been face to face with in all the years of my manhood. I have felt, if the court please, the importance of maintaining the honor and dignity, not only of this court, but of minor courts, as keenly and as sincerely as any other citizen of the commonwealth; and one of the most gratifying episodes in my life was when Mr. Justice Campbell, now upon the bench to try me, but a few years ago commanded me in the warmest terms for the respect I had always shown to courts with which he was associated, whether sitting as a *nisi prius* judge or as a member of this great body.

"I want to say to the court that I realize as keenly as any man in the United States the importance of an unsullied judiciary, and the importance of that judiciary ever maintaining the respect and the confidence of the people, for, if all else fails, it may be that the people of this country must depend upon the justice, the integrity and the patriotic spirit of our highest courts to preserve the liberties of the country.

"But if your honors please, I have always felt that there should be reciprocity between courts and the people. While the courts should receive the respect and the confidence of the people, there is a duty devolving upon the courts to ever maintain the law and the integrity of the constitution, and to keep within the limits prescribed by the constitution and laws of the state and the country; and in every one of their judgments, as their consciences tells them, to do the very right, and nothing but the right. If these relations exist between the people and the bar upon the one side and the courts of the country upon the other, there will be little need for contempt proceedings, and there will be little provocation for criticism either of the courts or by the courts, of the public press.

"So far as these articles are concerned, I want to say that I never wrote or published articles in my life the justice of which I was more sincerely convinced of; not only convinced of the justice was I, but of the necessity for their publication, and when this citation was served upon me, as I said, I was confronted with the most serious situation in which I had ever found myself in all of my public or private career. From all the information I could obtain after careful investigation—from those whose word could not be doubted—I felt that whatever was in those articles was justified, and the question was then up to me: Shall I, to escape the wrath of the court, say that I have been a slanderer, a libeler? Shall I proclaim to the public that I am infamous, in that I falsely charged the supreme court of my state with such things as are supposed to be contained in those articles? Or shall I do what any true man ought to do, firmly believing that he spoke the truth, say, that he had spoken the truth and offer to establish the verity of the articles?

"That, may it please the court, was the reason for the answer I filed.

"The attorney general tells the court that this court should not for a moment sit to investigate charges against its membership. I can only say, if your honors please, that is the most stupendous indictment that can be framed against the whole doctrine of constructive contempt; for, has it come to this in the United States, that the publisher of a newspaper, because men are judges, may not speak the truth of them as to their official actions, except at the peril of confinement in the common jail, the payment of heavy monetary penalties, or both?

"I realize, if your honors please, that so far as the legislature of this state is concerned, it has done everything in its power to change that condition. It has declared what shall be contempt, and has omitted everything with reference to constructive contempt; therefore, so far as the legislature is concerned, it has eliminated proceedings in constructive contempt from the powers of the court. The legislature has further provided for answers in contempt proceedings, for investigations, for juries, has fixed a limit to the power of the court in assessing punishments for contempts; and if constructive contempt is to be maintained as it has

been maintained by this court it can simply mean—and I speak it in a thoroughly impersonal way so far as the membership of this court is concerned I speak it as though I were addressing an impartial jury with no duty devolving upon its membership except to find and declare the truth—if this is to be maintained, it simply means that we have in each of the states of this Union a chosen body of men who may commit any crime; who may falsify justice; who may defy the constitution and spit upon laws, and yet no man dare make known the fact.

"So far as I am concerned, if the court please, I am unwilling to be bound by such a system, and, therefore, if no other result is to come from these proceedings beyond my own punishment than the arousing of the public to the danger of such a power in the hands of any body of men, a great good will have been accomplished; more, perhaps, than is necessary, to compensate for what I may suffer; and I only desire to say, further, before I sit down, that no matter what penalty the court may inflict, from this time forward I will devote myself—by constitutional amendment if necessary, and by the decisions of the court it has become necessary—to deprive every man and every body of men of such tyrannical power, of such unjust and dangerous prerogative, of the ability to say to publishers of newspapers; 'While about everybody else you may speak the truth, no matter what our offenses may be, you speak the truth with the open door of the jail staring you in the face, or the depletion of what you may possess of this world's goods, and probably of both.'

"If the court pleases, I am now ready to receive the judgment of the court."

All of the foregoing appears, (Record, folios 187-192).

Whereupon the court fined the respondent $1,000 and the costs of the proceeding and orderd that he be confined in the common pail of the county until the fine and costs were paid.

ERRORS ASSIGNED.

The errors assigned and filed are as follows:

I.

Issuing the rule on respondent to appear and show cause why he should not be punished for contempt.

II.

Not requiring the information filed in the cause to be verified before issuing the said rule to show cause.

III.

Making and entering of record, on the 20th day of October, 1905, an order permitting an affidavit in support of said information to be made and filed, and in overruling and disallowing the objections of plaintiff in error, Thomas M. Patterson, to the filing of said affidavit.

IV.

Overruling the motion of the plaintiff in error, Thomas M. Patterson, to quash the information and writ issued thereon in said cause.

V.

Ordering the plaintiff in error, Thomas M. Patterson, to file his answer in the cause.

VI.

Thomas M. Patterson, to be arrested and brought into court on the 29th day of November, 1905.

VII.

Sustaining the motion of the attorney general of the state of Colorado, for judgment on the pleadings.

VIII.

Adjudging that the plaintiff in error was guilty of contempt.

IX.

Not permitting the plaintiff in error to introduce evidence in the cause, and in denying to the plaintiff the right to prove the truth of the allegations contained in his answer.

X.

Denying to plaintiff the opportunity and privilege of proving the truth of the publications complained of in the information.

XI.

Ordering and adjudging that the plaintiff in error, Thomas M. Patterson, be fined in the sum of $1,000, and costs.

XII.

Ordering and adjudging that the plaintiff in error, Thomas M. Patterson, stand committed to the common jail of the City and County of Denver until said fine and costs are paid. (R. folio 195.)

ARGUMENT.

The questions involved all go to the "power" of the supreme court of Colorado to adjudge respondent guilty of contempt under the proceedings as they were had, and by reason of the publications that were made.

Respondent asserts and maintains first—The articles were legitimate and privileged criticisms; that they did not relate to "pending" cases within the meaning of the law, and that whatever reference was made in them to cases were in no wise calculated to interfere with the due administration of justice as to them. That these matters are jurisdictional and if the

contention is true, the court was without authority to punish respondent without depriving him of his property without due process of law.

Second.—That at common law, by the statutes of Colorado and the oft-repeated solemn adjudications of the supreme court of Colorado an affidavit or a verified information charging respondent with contempt and setting out the facts constituting the contempt were essential to the jurisdiction of the court to punish him for contempt, and that in the absence of such affidavit or verified information the judgment is without due process of law and in violation of the fourteenth amendment to the Constution of the United States.

Third.—That the court in issuing the citation without affidavit or a verified information in view of the hitherto uniform and oft repeated decisions of said court that such an affidavit or verified information was essential to the jurisdiction of the court, and proceeding to judgment against respondent, denied to the respondent "the equal protection of the laws" in violation of said fourteenth amendment of the Constitution of the United States, and that a verification of the information made after the issuance and service of the citation did not and could not remedy the said jurisdictional defect.

Fourth.—That the said articles and cartoon were printed in a public newspaper; they related solely to grave, important and public questions which they discussed only with frankness and in a proper spirit; that respondent, after his motion to quash the information and citation, was overruled was required to answer why, by reason of the said publications he should not be punished for contempt; that his answer constituted a complete justification; that the motion of the attorney general for judgment on the pleadings was to admit the truth of every well pleaded fact contained in said answer; that the court was without authority to punish respondent for publishing the truth about the court and judges stated in proper and decorous terms, and to do so was in violation of the Constitution of the United States in that it deprived him of his property without due process of law and of the equal protection of the law.

These propositions are all fundamental and go directly to

the power of the court to entertain the proceedings. They will be discussed in the order stated because that is the logical order, particularly as to events, but not, perhaps, as to the importance of the questions.

Before discussing the several propositions separately we would suggest some legal principles that are applicable to all of them.

It is a fundamental principle in all American governments whether state or National, that the right of an individual to life, liberty and property is beyond the control of arbitrary power and independent of its exercise. These rights have existed ever since the establishment of civilized government on this continent, and were recognized and enforced before national or state constitutions were framed or adopted. Constitutions were designed to perpetuate and secure the observance of such rights rather than to create them. To check the growth of arbitrary power, to secure the enjoyment of the fundamental liberties of the citizen and to afford complete protection to such liberties where the purposes for which the constitutions of the states and the United States were adopted.

The fifth amendment to the Constitution of the United States forcibly prevents the federal government from depriving any person of life, liberty or property without due process of law, while the fourteenth amendment operates as a like prohibition upon the states. The result of the latter amendment is to give to the national government whatever power may be necessary to prevent the states from such acts of arbitrary power, and whenever any person is so deprived of property by a state without due process of law, the federal courts have the undoubted power to prevent the abuse and correct the evil.

In describing the meaning and effect of the fifth and fourteenth amendments, Mr. Justice Matthews, in Hurtado *vs.* California, 110 U. S., 516, says:

> "Due process of law in the 5th amendment refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the Constitution of the United States exercised within the limits therein prescribed, and interpreted according

> to the principles of the common law. In the 14th amendment, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

In other words, the due process of law contemplated by the fourteenth amendment is that law of the State which derives its authority from the powers possessed by the people of the state, and found either in the constitution or the laws made under its authority. It is a power whose existence the law of the state recognizes, and which is exercised in accordance with law, and it does not contemplate even the existence in any department of government of any arbitrary power, nor a usurpation of law. As was said by the court in Bank of Columbia *vs.* Okely, 4th Wheaton, 244:

> "Due process of law was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

The fourteenth amendment operating upon the states applies to any action by authority of the staate, by whatever agency exercised, by which a person is deprived of property without due process of law, and whether such deprivation is by the executive, legislative or judicial departments of government. An arbitrary act procceding from the courts in cases where they have transcended their lawful powers, and thereby condemnec a person to the loss of property is as much within the prohibition of the fourteenth amendment, as if such deprivation was the direct result of executive or legislative usurpation. Due process of law has reference to certain fundamental rights which that system of jurisprudence, of which ours is derivative, has always recognized. If any of these rights are disregarded in the proceedings by which one is subject to the loss of life,

liberty or property, then such deprivation has not been obtained by due process of law.

Brown *vs*, Commissioners, 50 Miss., 468,
Rowan *vs*. State, 30 Wis., 129.

Such definitions have been approved in the decisions of this court, and may therefore be regarded as established.

It follows from this that, if the prohibition of the fourteenth amendment is not to be encountered, one may be deprived of his property only by force of some positive law, either statutory, common or constitutional, which rests upon and springs from the reserved and inherent powers of the people of the state in the regular course of the administration of such law, according to prescribed forms, and in accordance with those broad, general rules established for the protection of individual rights. No other proceeding is due process of law, so, that if the judgment of the Supreme Court of Colorado, imposing a fine of $1.000 upon the respondent, is an exercise of power by that court, which is not warranted by the general laws of the state, or is in excess of the powers conferred upon the court by law, then it necessarily follows that the imposition of such fine deprived the plaintiff in error of his property without due process of law, and was a violation to that extent of ihs rights under the Constitution of the United States.

We believe it may be safely asserted that every person is entitled to every safe-guard which the laws of his own state provide, and this safe-guard is enforced by the constitution of the United States. If the laws of a state are violated and there results from such violation a deprivation of property to an individual, a federal right has thereby been ignored and the federal courts have the jurisdiction to remedy the wrong. Since the Constitution of the United States guarantees to the individual the protection of the laws of his own state, a construction of the state laws becomes necessary in order to determine whether or not such provision of the federal constitution has been observed. But this inquiry involves something more than the mere construction of a state law. It must rather be determined whether the individual has been given the benefit

and protection of the laws of the state; not merely the meaning of a state statute, but rather the application of the statute itself; or even broader, whether a fundomental right secured to an individual by law has been denied to him. This latter question is not wholly a matter of local law; certain rights of an individual in his relations to other persons, and to the state, are so general in their nature that their determination is not entirely a matter of local law in the sense that they are dependent upon the construction of a statute or constitutional provision of the state.

As to what may be extended as protection to an individual by the constitution, or laws of a state, may in certain cases and under certain circumstances be purely a question of local law to be solved and ascertained by the decisions of its highest court. But wherever a right is asserted under the constitution of the United States, and denied by the state court, the decision of the latter is a federal question for the courts of the United States.

The right of a person to due process of law under the constitution of a state is one thing, while the right to the due process of the law of the state under the Constitution of the United States is another thing. While the same right may be guaranteed by both instruments, each sovereignty should determine for itself whether its own guaranty has been properly observed. If such is not to be the rule, then the ostensible and ultimate effect of the 14th amendment is to leave to the decision of the state court the determination of the rights of the person under the Constitution of the United States, a theory completely at variance with the proper understanding of our form of government.

We are familiar with the rule that, upon questions arising under the constitution and laws of a state which are dependent upon their construction, the decision of the highest court of the state will be followed by the federal courts, but the rule of decision to be so followed must be a settled rule, pertaining to purely local laws, as distinguished from broad, general principles of government and the fundamental rights of individuals. Every individual holds his liberty and property subject to the

law of the land, and not according to every change of opinion that may be made by the court of a state. The great safeguards of liberty which the Constitution of the United States throws about the person are not oscillating, changing or dependent upon a whim, caprice or even the malice of a state tribunal. If it were otherwise, the Supreme Court of a state could by its decree set aside the constitution of the state, deprive its citizens of their liberty or property, declare such deprivation to be due process of law, and thus completely nullify the guaranty of the Constitution of the United States. It was never the intention of the framers of that instrument to subject its vigor to the determination of a state tribunal.

In questions of general commercial law this court has repeatedly held in all of its decisions, that it would not be bound by the decision of the highest court of a state, and when such a doctrine is invoked in questions affecting the liberty and property of the citizen, his protection should be as great as if it were dependent upon, and secured by a personal commercial contract.

Again, it has been declared by this court that a change in the rules observed by state courts should have a prospective effect only. In Gelpcke *vs.* Dubuque, 68 U. S., 206, it was said:

> We are not unmindful of the importance of uniformity in the decisions of this court and those of the highest local courts giving constructions to the laws and constitutions of their own states. * * * But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shal never immolate truth, justice and the law because a state tribunal has erected the altar and decreed the sacrifice."

The Supreme Court of Colorado, in the present case, was the tribunal which selected the victim, erected the altar and decreed the sacrifice, when it was itself involved, and in carrying out the program, over-ruled or ignored not only every one of its own prior decisions in similar cases, but set aside the will of a co-ordinate department of government.

The facts of the present case make it exceptional within the

rule above laid down, and they involve propositions which have not been heretofore before this court for review. Ordinarily, as we concede, the decision of the supreme court of a state is followed by this court in certain matters of statutory and constitutional construction, but such decision should not be followed to prevent an independent review by this court, where the supreme court of the state itself, rendering the decision, is one of the real parties in interest in the litigation before this tribunal, not nominally but substantially. The rule that such decisions must be followed by this court is not an absolute rule; various exceptions to it having been noted and observed.

First.—It does not apply where general questions of commercial law, custom and usage are involved.

Second.—If any contract, when made, was valid by the laws of the state as then expounded by all departments of its government, and administered in its courts of justice, no subsequent decision of the state court altering the construction of the state law is binding upon this court, certainly not as to transactions happening before the changed construction.

Third.—Where there is a change of judicial decision as to the constitutional power of the legislature of the state to enact a law, such change is not necessarily binding upon this court.

Fourth.—A change in the decision of a state court by which a retrospective effect is sought to be given to contracts, is not binding upon this court.

Fifth.—A decision of a state court placing such a construction upon its own laws or constitution that they will conflict with the Constitution of the United States, will not be followed by his court.

Sixth.—In certain exceptional cases recognized by this court, but not defined, it will not follow the decision of the highest court of the state.

Seventh.—Where general principles of law independent of statutory or constitutional construction are involved, this court is not bound by the decision of the highest court of the state, but decides the case according to its own jundgment.

Town of Venice *vs.* Murdock, 94 U. S. 494.

Eighth.—Where by following a decision of a state court, it would result in the immolation of truth, the perversion of justice and the sacrifice of general legal principles.

Ohio Life Insurance Co., *vs.* Debolt—16 Howard, 432.
Gelpcke *vs.* Dubuque, 68 U. S. Supra.
Rowan *vs.* Runnels,—15 Peters, 449.

In the Medley case, 134 U. S., 160, this court determined for itself whether a statute of Colorado was *ex post facto,* and held that it was, notwithstanding the decision of the Supreme Court of Colorado, (In re—Tyson, 13 Colo. 482,) held that the same statute was not *ex post facto.* Thus in these two cases, the Supreme Court of the United States, after the Colorado court had sustained the validity of the act of 1899, holding that it was not an *ex post facto* law, held the same statute to be invalid and unconstitutional. The dissenting opinion in the Medley case did not suggest that the opinion of the state court should be followed. It was evidently the theory of this case that when the Constitution of the United States prohibited the state from passing an *ex post facto* law, the courts of the United States should have the right, as it was their duty, to determine whether or not a law of a state was an *ex post facto* law. So, here, when the Constitution of the United States prohibits a state from depriving any person of life, liberty or property without due process of law, the courts of the United States have the right, as it is their duty, to determine for themselves whether a judgment of a state court depriving a person of his property was according to due process of law, as contemplated by the Constitution of the United States.

The meaning of Gelpcke *vs.* Dubuque, 68 U. S. Supra., is simply the announcement by this court, as we understand it, that in cases where, by following the decision of the highest court of a state, the principles of natural justice would be violated, the Supreme Court of the United States will not preclude itself from the right and duty to administer justice and properly perform its functions under the constitution.

The Constitution of the United States was designed to secure

results, and whatever defeats the design of the constitution is unconstitutional. It would be a total failure of the aim and purpose of the Constitution of the United States to say: "True, you cannot lawfully be deprived of your property without due process of law, but, even though you have been so deprived of property by a decision of the highest court of your state, which chose to ignore the law, nevertheless this court is powerless to afford relief under the Constitution of the United States, in the face of the usurpation of the state court." The maintenance of such a doctrine tends inevitably to place the construction of the Constitution of the United States, ultimately and finally, in effect, in the hands of the State Supreme Court. The rule as to following state decisions, however, should never be so construed as to extend to cases wherein the state court, whose decision this court is asked to follow, is itself a real party to the litigation in which rights under the Constitution of the United States were asserted and denied by the court. In other words, it seems to us to be a violation of every principle of natural justice to have the constitutional rights of the plaintiff in error finally and conclusively determined against him by the decision of the state court, which decision was rendered by the court in a proceeding to which it was a real and substantial party. It is a distinct shock to the prevailing opinions of judicial propriety for judges to sit in their own cases, but it is infinitely worse to permit a state court to cover up and hide behind its own wrong, by conceding it the power to deny a defendant due process of law in depriving him of his property, and having such decision, made by itself, in its own interest, to cover up its own short-comings, preclude the Supreme Court of the United States from an independent examination of the law, in order to grant the relief prayed for by this writ of error. We submit in all earnestness that the rule is not to be so extended as to permit it to be invoked to enable the judges of a state court to take advantage of their own wrong. To illustrate: If certain judges, comprising the majority of a court, enter into a conspiracy to gain by unlawful means certain property owned by individuals, and in furtherance of such conspiracy, by means of collusive litigation in-

volving the title of such property, render a decision which not only accomplishes the object of the conspiracy, but which in fact deprives the owners of their property without due process of law, and such a state of facts appears upon the records of the case as certified to this court, certainly the law and the Constitution of the United States are not too hopelessly impotent as to be unable to, or to be precluded from, granting the necessary relief. Such a case would doubtless be recognized by the Supreme Court of the United States as an exception to the rule that it must follow the decisions of the state tribunal.

The record in the present case discloses, without contradiction, that a majority of the members of the Supreme Court of Colorado were directly and personally involved in the issues making up the case tried and decided by them; that their decisions, of which complaint was made, were rendered in cases which, by their own former decisions, they declared that they had no jurisdiction to entertain; that these cases were the direct results of a criminal conspiracy of which it is difficult to believe they could have been ignorant, and from which two of the four judges were to, and did, directly derive personal, pecuniary and official benefits; that the other two judges were active and potent participants in aiding certain conspirators to pack the supreme court with their creatures, and that these four justices, constituting the majority of the court, after its organization by the addition of the two selected by the corporations, and whose selecion was paid for by the corporations, joined in a decision declaring invalid an amendment to the constitution of Colorado, which but a short time before the supreme court declared to be valid—and which decision was in itself one of the chief objects for whose accomplishment the conspiracy was undertaken and carried out.

During the trial of the contempt case, the respondent claimed certain rights under the Constitution of the United States, but this claim of constitutional right was denied by the court, a majority of which was composed of the four justices whose acts and decisions are set forth in respondent's answer. Under the circumstances of this case the constitutional rights of the plaintiff in error under the Constitution of the United

States, should not be left to the sole determination of judges of a state court whose integrity, honesty and judicial rectitude were under investigation and were challenged in the answr respondent was required to file.

The recommendation of the grievance committee of the State Bar Association was perculiar and was not followed by the supreme court, except that it saw that contempt proceedings were commenced. It was, quoting from its resolutions before herein set out: that the committee believes "that *some* of said articles contain matters of sufficient importance *to justify an inquiry* by contempt proceedings against the persons responsible for their publication." This was a half-hearted recommendation, the name of respondent was not mentioned, but the most significant of it all is, that it to all intents and purposes recommended an investigation. The investigation the court has denied; it stopped short when respondent was gotten before its bar with sentencing him to fine or jail.

At this point we would ask the court to read the dissenting opinion of Mr. Justice Steele in connection with the court's opinion. Mr. Justice Steele meets the positions of the rest of the court with masterly clearness and logic. The court does not state a single proposition which Mr. Justice Steele does not confront with most conclusive refutation.

For the convenience of this court we suggest that the opinion of the court really commences at page 148 of the record, for the court occupies the forty-five previous pages devoted to its opinion with copies merely of respondent's motion to quash and his answer.

Mr. Justice Steele's dissenting opinion commences at page 171 of the record.

We will now proceed to discuss our different propositions in detail. Their presentation will disclose their relation to the different assignments of error, and will we trust convince the court that the errors alleged have in every case been substantiated.

I.

The Articles and cartoon were legitimate and privileged

criticisms. They did not relate to "pending" cases within the meaning of the law; and whatever reference they made to cases were in no wise calculated to interfere with the due administration of justice. These matters are jurisdictional, and by reason of them the court was without jurisdiction to proceed against respondent for contempt and to adjudge a fine against him, and in so doing it was the rendering of a judgment that deprived him of his property without due process of law.

The situation was as follows, as averred in the information: The supreme court on the 23rd day of June, 1905, handed down decisions and filed opinions in eight cases in which the titles and numbers are set out in the information. They were generally known as "The County Officers Election Cases." There was also pending in said court another cause relating to what was known as the "Auditorium bond ordinance," No. 4918, concerning which no decision had been rendered or opinion filed. As to case No. 4918 we will call the court's attention specifically to that when the article in which it is mentioned is reached. It isn't necessary to do so until then. A bare reference to it at that time will eliminate it altogether.

As to the eight election cases the following are the averment in the information:

> "That on June 23d A. D. 1905, this court rendered a decision in each of the foregoing causes, but said decisions are still under the control of and subject to revision by this court." (Folio 9.)

The averments in respondent's answer as to those cases are as follows:

> "He denies that the cases mentioned in the information, except Case No. 4918 * * * were at the time mentioned pending in said court, but as to the said cases, except said case No. 4918, he avers that the said supreme court had, at and before the time of the publication of the said articles in the said News and Times rendered the opinion therein, and had decided the said cases after final argument and submission and had or-

> dered judgment in each except that the time had not elapsed within which motion for rehearing might be filed." (R. folio 46.)

The court in its opinion in the case at bar says as to these election cases:

> "The publications charged in the information were made June 24th, 26th, 27th, 28th, and 30th. June 23rd, the causes mentioned in the information as 'County officer election cases' were decided by this court. Under a rule of court petitions for rehearing were filed in the causes and were undisposed of *on the date of the last* of same publications, June 30th." (R. folio 326.)

Mr. Justice Steele in his dissenting opinion makes the following statement upon the same subject:

> "The court says: 'While such causes were before the court upon the petition for rehearing they were, as to the law of contempt, pending causes.'
>
> "They were pending—theoretically. The court had rendered judgment. The opinions were filed giving reasons for the judgments as required by law. No petition for rehearing had been filed when the articles were published. *The opinions were given out for publication* and as they involved great public questions they were published. By giving out the opinions the court invited criticism and should have expected that would happen which did happen. It was not only the right of these journals to criticise at this most opportune time, but it was the right of the public to hear and read concerning them. Moreover under our practice, nothing that has been presented will be considered by the court on petition for rehearing; so that unless it is intended to stifle and prevent criticism at the time when it is intended the public should hear what judgments its judges are rendering, the rule, announced by the court is unjust. But whether it was so designed or not its effect is the same; for it is left to the judges to determine when they will pass upon a petition for rehearing, and it may be a year or more after the judgment is rendered before the petition for

rehearing is granted or denied. In a case filed by one Moyer, in which the decision was rendered in the spring of 1904, leave to withdraw the petition for rehearing was not granted until the summer of 1905, although leave was asked in the summer of 1904. This was a case in which the people were vitally interested and the public had a right to hear the questions involved discussed. Yet the court withheld its permission to withdraw the petition for nearly a year."

We have quoted the statements in the pleadings and the opinions so that no misunderstanding may exist as to the real status of the election cases when the publications were made, and the true meaning of the statement in the information that "a decision had been rendered in each of the said causes, but said decision was still under the control of and subject to revision by this court." (R. folio 394.)

The admitted and indisputable facts then, are as stated in the petition and answer, that the said elections cases had been submitted, argued and decided by the court, the opinions of the court had been filed and given out, and all that remained to the losing parties was a right to file petitions for rehearings, which the court might decide immediately or at an indefinite time in the future, when the articles complained of were published.

We contend that these elections cases were not in fact "pending cases;" that if pending in any sense, it was but a theoretical "pending." That the court having decided the cases, filed the opinions and given them out for publication, no criticism connected with them could be held to be contempt. The court must be presumed to have had knowledge of the status of the cases both from the averments of the petition and from the records of their court.

Two things must exist to sustain a prosecution for contempt against a publisher for articles alleged to assail the dignity and integrity of a court: They must be articles published in reference to "pending" cases *and* such articles must be calculated to interfere with the due administration of justice as to such cases.

But first, is this a jurisdictional question? If the articles are of the character maintained by respondent has a court power to proceed to judgment of guilty against the publisher of them? If it has not, then a judgment of guilty must be without due process of law.

It should be borne in mind that respondent has been convicted in a criminal proceedure. He was accused of what is known as criminal construction contempt. In Titus *v.* the People (7 Colo. 451) the Colorado Supreme Court in discussing this class of contempts used the following language:

> "In our judgment proceedings in cases of this character partake sufficiently of the nature of criminal actions to warrant us in holding that they must be received as such."

The Colorado court in its opinion in the present case throughout proceeds upon this theory and declares that respondent's offense is a criminal one, that because it is criminal the legislative enactments limiting contempts and prescribing a practice for their prosecution, a mode for their trial and the degree of punishment are not applicable to this case because they are amendments to the civil code and cannot affect criminal causes.

> "Contempt of a court is a special criminal offense and the judgment is a judgment in a criminal case."
>
> New Orleans *vs.* Steamship Co. 20 Wall. 387.

It follows as an unassailable rule, therefore, that in cases of criminal contempt not committed in the presence of the court, there must be a charge, the charge must be in writing and (without discussing now the need of verification) the charge must state the facts constituting the contempts, and unless the facts set out constitute a contempt the court is without jurisdiction to either issue a citation or proceed further with the cause.

The Supreme Court of Colorado decisively and unqualifiedly declares this doctrine.

In Cooper *vs.* The People, 13 Colo. 337, one Wyatt filed an affidavit charging the respondent with contempt for publishing highly scandalous articles of the court and in a cause in which he was a party. Cooper was adjudged guilty and sentenced to pay a heavy fine by the district court. Cooper sued out a writ of error from the supreme court.

In its opinion the court says: The sentence being for contempt our right to review the action of the court below is challenged in consequence of the following provision of the statute: "The judgment and orders of the court or judge made in cases of contempt shall be final and conclusive." (Sec. 360 Civil Code.)

Quoting authorities, the court proceeds: "The review must be limited to jurisdiction, and no error of law or fact not jurisdictional can be considered."

Then as to the duty of the court at the very outset of a contempt proceeding it lays down this rule:

> "When an affidavit is presented as the basis of a proceeding for contempt the court *must* in the first instance examine the same and if the *facts* presented do not show that a contempt has been committed *the court will be without jurisdiction to proceed.*"

Under this rule the court discussed the articles which were the basis of the contempt, and finding in them and the other averments the necessary elements of the charge affirmed the judgment.

Again in Mullin *vs.* The People, 15 Colo., 440, proceedings for contempt were commenced by a verified information filed by the district attorney, Mullin was adjudged guilty and he sued out the writ of error from the supreme court. In that case the contempt consisted of statements by Mullin in a petition filed by him for a change of venue. The court having decided that it was proper to commence such proceedings by a verified information said:

> "We will therefore inquire as to whether or not the facts alleged in the verified information are sufficient

> to constitute a constructive contempt of court. If the facts charged do not show affirmatively that a contempt has been committed the judgment must be reversed."

Then the court considers the language of Mullin in his petition for change of venue, and says:

> "As we have seen this language is not *per se* contemptuous and there is no charge made in this information going to show that plaintiff's conduct was not consistent with his entire innocence of evil intent. *We must therefore conclude that no contempt is charged in the information.* It should therefore have been quashed on plaintiff's motion."

In a second case of Wyatt *vs.* The People, 17 Colo. 252, the court discusses the subject of constructive criminal contempt most exhaustively. This has been considered the leading case in Colorado and is cited by the courts of other states with distinct approval. It is worthy of careful consideration.

The opinion opens with the following statement:

> "Statutes such as section 334 of the Civil Codes declaring that the judgment in contempt proceedings 'shall be final and conclusive' simply expresses a principle of the common law. This principle is decisive against the right of review on the ground of mere error in the trial. It does not, however, preclude inquiry into the question of jurisdiction. If as a matter of fact the act complained of constituted no contempt, *the court is without jurisdiction* to find the party guilty, and its judgment will be set aside by the proper appellate tribunal." (Citing many authorities.)

The court then discussed the things charged against Wyatt in the information and found they did not constitute contempt.

Before concluding the opinion the court takes issue with decisions that had been cited in the following strong and significant language:

> "There is now and then a case like that of *ex parte* Summers, 5 Iredell 149, which seems to hold that in courts of superior jurisdiction the record need not dis-

close the grounds on which contempt is adjudged. But in *ex parte* Summers an actual not constructive contempt was under consideration and reliance was placed mainly on English decisions; besides the justice of having these grounds thus appear is considered and the practice strongly commended.

"The position of those authorities which hold that where the contempt is constructive the affidavit must show the offense, commends itself with irresistible force. *A proper regard for the liberty of the citizen forbids the arrest of parties upon criminal attachment charged with contempts without information under oath* touching the precise character of the alleged offense."

The court then dissects the sworn information and finds that the facts charged did not constitute contempt, and that the judgment for that reason was entered without jurisdiction.

Rahalje on contempt fully sustains the Colorado court in the doctrine announced.

Thus it is clear:

First.—That the offense with which respondent was charged is a specific criminal offense.

Second.—That a charge, usually an affidavit, must be filed as the basis of citation or arrest.

Third.—This charge must state the facts constituting the alleged contempt.

Fourth.—That though a judgment of contempt is not reversable for error at the trial, courts will always examine the affidavit or sworn information to see whether the facts charged constitute a contempt.

Fifth.—If the affidavit, etc., does not state facts showing that a contempt has been committed the court is without jurisdiction to proceed and a judgment of guilty in such a case is void.

Respondent contends that an examination of the information shows:

First.—That the cases to which the articles refer were not in fact pending cases.

Second.—That the reference to the cases in the articles

were strictly within the bounds of authorized criticism and discussion.

Third.—That the articles were in no proper sense calculated to interfere with the due administration of justice, or to influence in any degree decisions by the court in the cases mentioned in the information.

If these contentions are sound then the Supreme Court of Colorado was without jurisdiction to enter the judgment it did, and such judgment unless set aside will deprive respondent of his property without due process of law.

To fairly determine the above contentions, the articles charged to be contemptuous will be quoted here precisely as they were printed by respondent in the papers he controls, with the innuendos, inserted by the attorney general omitted, These innuendos but tend to confuse the mind and togive color to the articles that is neither logical nor warranted.

FIRST ARTICLE.

The first article was published on the 24th of June, 1905, and is an editorial written by respondent. It follows:

"The Elections Decision.

> "The decision rendered yesterday by a majority of the supreme court in the election cases is the most far-reaching and portentious that has ever been rendered by any court in the United States. For the first time in the country's judicial history it is announced that the people may amend their state constitutions only just so far as a supreme court is willing that they should. With the twentieth amendment as much a part of the constitution as any one of the original articles, with the addition that the provisions of the twentieth article are the latest expressions of the sovereign will of the people, the supreme court holds that portions of it are inoperative because they are unconstitutional. In other words, a part of the state constitution is unconstitutional—treating constitutional provisions as though they were state statutes and subject to be annulled by measuring them with the constitution of which they are a part.

"The wrongs that this decision will work are innumerable and irreparable. The chief scheme of government under the twentieth amendment—the consolidation of offices, the retrenchment in salaries, home rule in local matters—are all practically wiped out and the old, old and pernicious order of things restored.

"The people of St. Louis and San Francisco, who have been enjoying the full benefits of just such a system of government as the twentieth amendment provides, will be astonished to learn that they no longer live in a republic—for the Colorado Supreme Court holds that such a government is so unrepublican that it cannot be tolerated in Colorado.

"What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered."

As to this article there is not a word in it that is not comment fully justified by the decision. The full import of the decision is presented in respondent's answer. So clearly is this true that the attorney general finds fault with but the last clause of the article, which he repeats in the information to point it with an innuendo. This is the language of the information as to that:

"That the concluding paragraph of the said editorial is as follows:

"What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered.'

"Meaning thereby that the court and the justices thereof are controlled by certain corporations and by partisan political influence, and were so controlled in rendering the decision in said causes. (R. folio 10.)

This innuendo is not warranted at all by the language. The paragraph refers to no court. It relates to the mere possibilities of the future, and carries no suggestion of corruption on the part of any court or of the supreme court in connection with the cases it had decided. It does indicate that the utility corporations of Denver and the political machine they control

were paramount in Denver's local affairs and that whatever they might wish to bring about would be accomplished. But we submit that a court is reaching far beyond anything the sentence warrants to enmesh itself by innuendo in corporation control and political intrigue.

> "In contempt proceedings for the publication of a newspaper article the publisher is entitled to have the article fairly interpreted and construed."
>
> People *ex rel vs.* Stapleton, 18 Colo. 576.

This being a prosecution for a specific criminal offense, the respondent is entitled, if two constructions may reasonably be placed upon the challenged paragraph to have that construction most favorable to his innocence placed upon it.

We are content to submit the above article to the court's own judgment, confident that it must conclude that it does not contain a word or sentence that may not be published at any time in connection with any judicial proceeding in a country where the freedom of speech and of the press is the cornerstone of its liberties, without justifying a prosecution for contempt.

THE CARTOON.

This will be discussed after the presentation of the articles has been concluded.

THE SECOND ARTICLE.

The second article was a communication to the Times by a Denver lawyer. It was submitted to respondent and printed in the issue of June 26th with his approval. It follows:

"PROPHECY.

> To the Denver Times:
>
> Let me indulge this one time in prophecy. I feel the spirit of prophecy moving me. I do not for a moment imagine that I may be touched by the divine

afflatus—I have merely studied the decisions of the supreme court, for I am a lawyer. I know as common history the influence that created the majority of the court as it now is, and I am old and experienced enough to judge of motives; and knowing the sponsors for the chief justice and his colleague Goddard, and the interests they control, I am convinced that their intervention after the last election to overturn the senate as it stood, and to bowl out Governor Adams was not merely to prove themselves powerful bosses, or to advance themselves politically, but it was to carry out a business proposition that means millions upon millions of them, and especially to William G. Evans, the most conscienceless boss that ever destrode a suffering people. They find the Denver charter in their way. The clauses that under the Rush amendment prohibited the granting or renewal of franchises is an obstatle to the renewals both Evans and Cheesman must soon have, or the vision of Denver continuing their lawful pray for half a century will vanish as the morning mist. Their activity to secure a court that is under obligation sto them commences and ends with these franchises—hence, my prophecy.

But I should add that my prophetic spirit has been quickened by a conversation with one of Boss Evans' collaborators, which, though guarded as to the court, was as clean-cut as Denver's bracing morning air about Evans' and Cheesman's expectations. The provisions of the charter requiring the submission of the extension of franchises must be gotten out of the way—and they can be eliminated from their business problems only by the total destruction of the Rush amendment and the charter.

OMINOUS HINTS FROM COURT.

Already some of the vital features of the amendment and charter have been stricken out by the late decision. That the sheriff and other county officers may not be elected in the spring and city officers may not perform their duties, as decided by the court is not so important to the rest of the governmental scheme; but the savage attack made by the court in its opinion on the entire scheme—guarded, but plainly inimical—is more ominous than the materiality of the question decided.

Now comes my prophecy.

Before long—it may be through the decision upon the auditorium bond ordinance, that is expected before the court adjourns—the supreme court will wipe out the Rush amendment and the Denver charter entire. If not altogether in the auditorium case, that opinion will eliminate more of the charter provisions, and before another year rolls around, amendment and charter will be no more.

The process of killing by elimination is one well known to courts. I have in mind the income tax law that the Supreme Court of the United States declared unconstitutional. That august body first held certain provisions of the law to be unconstitutional and while what remained was not unconstitutional it held that it was altogether improbable that congress would have passed the law with the unconstitutional provisions eliminated; and so it annulled the entire law—the constitutional parts of it as well as the unconstitutional parts.

JUDGE GABBERT'S CHANGE.

The application of this to the Rush amendment and the Denver charter is palpable. I can see through the windows of my mind that Judge Gabbert has never forgiven himself for agreeing with Judge Steele in the Sours case—the case that upheld the Rush amendment. He had not then left the Democratic party and lined up politically with Evans, Cheesman, Hearne, Guggenheim and Co. Now he is of them and with them, and that makes a difference.

I don't impugn Judge Gabbert's motives. I have no right to. Judges, as well as ordinary mortals, are largely the victims of their environment. So, unconsciously, moved by his environment—but, of course, they are of his own making—the chief justice, with his Brother Goddard and his Brother Campbell—who has not stood in need of conversion—aided by the late judge of the court of appeals, will undo the amendment and charter piecemeal and then, with one fell swoop, cast the rest into outer darkness.

This prophecy is a little discursive, you think. I think so, too. For I might have boiled it down into the following propositions and left it to the public:

First—The Tramway and Water Companies must have their franchises renewed.

Second—The Rush amendment, until utterly destroyed prohibits the extension unless by a vote of the people.

Third—This the Tramway and Water Companies can never get.

WIPE OUT THE RUSH BILL.

Fourth—The Supreme Court, by the process of elimination and then with a final swipe at what is left, will annul the amendment and charter altogether.

Fifth—And then the corporations will be happy. With the double-headed machine they have constructed in Denver a city council can always be depended upon to give them what they demand and will pay for.

But—I speak it advisedly—let the Tramway and Water Companies and the City Council REMEMBER PHILADELPHIA. What was done there can and will be done in Denver. THE PEOPLE ARE MIGHTY IN THEIR WRATH AND WILL NOT SUBMIT TO BEING ROBBED WHOLESALE.

Denver, June 25, 1905.

PUBLICUS

We wish to impress upon the court that there is but one paragraph in this entire article that refers even remotely to the elections cases, and we requote that paragraph.

> "Already some of the vital features of the amendment and charter have been stricken out by the late decision. That the sheriff and other county officers may not be elected in the spring and city officers may not perform their duties as decided by the court is not so important to the rest of the governmental scheme; but the savage attack made by the court in its opinion on the entire scheme—guarded, but plainly inimical—is more ominous than the materiality of the question decided."

Independently of this paragraph and in all of the article that precedes it the references to the court and judges are as

to matters ante-dating the elections decisions, and to William G. Evans and the interests he represented as the sponsors for the chief justice and his colleague Goddard and to his intervention after the election preceding by a year the publication of the articles, to overturn the senate as it stood and to bowl out Governor Adams. It then and before the paragraph above quoted, referred to the prophetic spirit of the writer having been quickened by a conversation with one of Boss Evans' collaborators which "though guarded as to the court was clean cut," etc. Not a word in what precedes the quoted paragraph as to the cases referred to in the information. Following the quoted paragraph is the "prophecy" of the writer. It is, that before the court adjourns it would wipe out the Rush amendment and the new charter entire. "If not altogether in the auditorium case that opinion will eliminate more of the charter provisions and before another year rolls around amendment and charter will be no more.

The next paragraph refers solely to the decision in the income tax case by the Supreme Court of the United States.

The next paragraph, the writer still seeing through the spirit, expresses the opinion that Judge Gabbert has never forgiven himself for agreeing with Judge Steele in the Sours' case—not one of the elections cases, but one that has been decided nearly a year before and that upheld the Rush amendment. He suggests that Judge Gabbert had not then left the Democratic party and lined up with gentlemen that are named, and he continued, "now he is with them and of them, and that makes a difference."

The article then expressly disclaims impugning Judge Gabbert's motives. He refers to him as being "unconsciously moved by his environment," but that his environments are of his own making; that the chief justice with Justices Goddard, Campbell and Maxwell will undo the amendment and charter piecemeal and then cast it all out into utter darkness. We submit that this paragraph does not criticise the court or any of the judges for their decision in the elections cases nor does it refer to any cases pending. It is avowedly a guess or prediction as to what future decisions are likely to be and it could

not remotely influence the court in its decision of pending cases. Then follows the prophecy in concrete. It is first that "the tramway and water companies must have the charters renewed. This as the court knows would necessarily be through either the legislature or the city council and the court court have nothing to do with it. Second.—The Rush amendment until utterly destroyed, prohibits the extension of franchises unless by a vote of the people." This, the Rush amendment to the constitution clearly establishes. Third.—"This the tramway and water companies can never get." This was merely the opinion of the writer and had nothing to do with the court. Fourth.—"The supreme court, by the process of elimination and then with a final swipe at what is left will annul the amendment and charter altogether." The word "swipe" is a vulgarism and is undignified, but the writer simply expresses his views as to what the court will do in the future with the Rush constitutional amendment. Fifth.—"And then the corporations will be happy. With the double headed machine they have constructed in Denver the city council can always be depended upon to give them what they demand and will pay for." This is the opinion of the writer as to the frame of mind the annulment of the amendment would leave the corporations in and a statement of what everybody in Denver knows to be the fact, that the Evans' double-headed political machine has the city council of Denver absolutely under its control. The writer concludes with warning the tramway and water companies and the Denver city council (not the courts, even by innuendo) to remember the uprising of the people of Philadelphia to overcome the ring of that city that strove to rob it of its franchises.

Referring to the paragraph that we quoted as referring to the elections cases, the writer refers to the elections decisions to say that the deposition of the officers affected by it was not so significant as the savage attack made by court on the entire charter scheme, which he said was guarded but plainly inimical and was more ominous than the materiality of the question really decided.

That is but an expression of opinion of the effect and mean-

ing of a court's decision, a pastime that any one may indulge in and express himself, however erroneous his views may be.

THE AUDITORIUM BOND CASE.

In this artide is found the only reference that is made in that or in any other of the articles to case No. 4918, and that is the only case outside of the elections cases, that is referred to in the information. We call attention to that case and that reference now to eliminate it once and for all from the controversy. We requote all that is said about it.

> "Now comes my prophecy. Before long—it may be *through the decision upon the Auditorium bond ordinance,* that is expected before the court adjourns —the supreme court will wipe out the Rush amendment and the Denver charter entire. If not altogether in the auditorium case that opinion will eliminate more of the charter provisions, and before another year rolls around amendment and charter will be no more.'

We submit that to base a charge of contempt upon such a reference to a case pending in any court, whether determined or undetermired, is the height and sublimity of absurdity. The mind must be indeed morbid that would regard the expression of an expectation or a possibility that a pending case would be deciled in a particular way as an attack upon the dignity of a court or as calculated to unduly interfere with the due admiristration of justice.

No further reference will be made to case No. 4918.

We have been thus tedious in analyzing the foregoing article because it served to bring out with some force the distinction between pending cases and cases previously decided; and as to the latter, the expressions of opinion as to how they were likely to be decided. It enables us to demonstrate that if aspersions were cast upon any members of the court in the article, they were made because of the men and the interests that stood sponsor for the judges named. But such criticisms do not make a writer liable in contempt; but should they be libelous the author may be made to answer in a civil or criminal proceeding for libel.

THE THIRD ARTICLE.

The third article is a local one printed in the Evening Times of June 27. Respondent knew that it was going to be published and approved of it. It is as follows:

"SPEER IS NOW ADVANCING EXCUSES.
MAYOR SAYS EVANS WORKED TO SAVE DEMOCRATS, BUT FIELD WAS FALSE.

Many are the stories being told by the friends of the victimized county officials who have been thrown out by the recent famous decision of the supreme court. One thing is certain, that William G. Evans has been posing as the keeper of the conscience of the court in all matters governmental and political. Through his henchmen he had talked so much along that line that the Democratic county officials commenced to believe his claims were actually true, whether true or not. Of course the officials know that Evans was chiefly instrumental in the legerdemain of last winter that resulted in the supreme court being organized as it now is, and in the robbery of the governorship and turning the stolen office over to McDonald. These and other matters, now so notorious that it is needless to mention them, led the Democratic officers to religiously believe in the power that Evans claimed to possess in high judicial quarters.

The officials knew that Mayor Speer was deeply concerned about the Democratic conference called by Senators Teller and Patterson, Ex-Governors Thomas and Adams, with Hon. S. W. Belford, because he claimed it was a blow aimed at him and might sadly weaken his influence in local politics. The mayor had done much talking denouncing Senator Patterson and insisting that the conference was called because the Senator was his enemy, and he started runners over the state to fix state committeemen, before they came to the conference and to disturb, as much as possible, the plans for the conference. Several Democratic officials, desiring Speer's active interference with Evans, and through Evans with the powers—held a meeting for consultation. The result of the meeting was that they went to Mayor Speer and told him that if he

would interpose for them with Evans that the decision with which they were threatened might be averted, they would stand by Speer all through the conference, and in the future would back him in his political schemes. Mayor Speer gave the necessary promise and the officials withdrew, much relieved as to their future.

MAYOR SPEER'S EXCUSE.

It is not hard to judge of the astonishment of the officials after the decision of the court was announced. When they recovered from the excitement into which it threw them, they went to Speer to berate him for his faithlessness. Speer insisted that he had done what he had promised, and that Evans had done all he could, but that they had been backcapped by Field, of the Telephone Company, and that Field was the marplot who defeated Evans' efforts.

Just precisely the degree of good faith that Mayor Speer exercised is problematical. It is probable that he did the best he could, but it is idle to say that Bill Evans himself would think for a moment of raising his hand to keep the Democratic officials in power when he could, by permitting the decision which he anticipated to be rendered fill all of the offices with his Republican henchmen, who would be subject to no influence outside of those he exerted himself. So long as Democrats held offices, however friendly they might seem to be to him, and his schemes at present, he knew that a sentiment of extreme hostility against him and his plans of plunder was growing in the Democratic masses, not only of Denver, but of the entire state; and he also knew that the time would come when those in office who claimed to be Democrats would be compelled through public opinion in the Democratic party to either abandon him and his schemes, or abandon the party of which they were members.

If any Democrat, whether of the Evans type or any other, believes for a moment that Evans would remain true to a political obligation when the Tramway and Water Companies' interests were involved, they have known the man to little purpose for twenty years. He is in politics not for the sake of politics nor for the pleasure it gives him to boss, nor is he moved by the slightest desire of political preferment for himself,

but wholly and solely for business reasons. Snch a man, moved by such impulses, could remain true to no party, and to no set of men only so long as his business interests could be served by them. Hence, the beautiful manner in which he has backcapped and double crossed the very men whom he put in office a little over a year ago because he believed they would best serve his business ends.

The question is asked by a good many of these Democrats: What will Mayor Speer do now that he has seen his colleagues upon the ticket with him slaughtered through as black treachery as was ever concocted?"

He and his appointees remain the only monument of the deal that placed them all in office. Will he stand by and use his office for the development of Evans' schemes after Evans has done his part—and it was no mean part—toward depriving all the rest of the political triumph that they recorded when they were elected?

A careful reading of this article will show that it related to stories being told by the friends of the Democratic officials who had been thrown out by the said elections decisions. It asserts as a fact that William G. Evans, the boss of the Denver utility corporations, and of the political machine of both parties in Denver, had been posing as the keeper of the conscience of the court in all matters, governmental and political; that he had talked so much along this line that the Democratic officials commenced to believe that his claims were true. It asserts that the officials knew that Evans was chiefly instrumental in the legerdemaine that resulted in the Supreme Court being organized as it was and in the robbery of the governorship, and that these and other matters had become so notorious that the Democratic officers believed that Evans possessed the power he claimed to have in high judicial quarters. Then follows a paragraph wholly devoted to a Democratic conference called by Senators Teller, Patterson and others which angered Maybr Speer (a Democrat) and who took vigorous steps to defeat the objects for which the conference was called. That several of the Democratic officials went to Mayor Speer and urged upon

him that if he would interpose to get Evans to use the influence which he claimed to have to avert the adverse decision in the elections cases they feared might come, they would stand by Speer in his efforts to control the conference. That Speer gave the necessary promises. That the officials were much astonished after the decision and they went to Speer. Te insisted that he had done what he had promised and that Evans had done all he could, but that Field, of the telephone company had defeated Evans' efforts. The article then discusses the degree of good faith that Speer may or may not have exrcised though he probably had done the best he could, but that Evans, being a Republican nominally, would not be likely to do anything to keep Democratic officials in power, when he could, by not interfering with the decision which he anticipated, put his Republican followers in office, fearful that Democrats through party influence might be induced to abandon him and his schemes of plunder. The rest of the article is devoted to rescanting upon Evans' character and the perfidy of which he was capable. It claims that Speer's colleagues elected as Democrats on the ticket with him had been slaughtered through black treachery.

The article professes to be a recital of claims and deeds and feelings of those other than the members of the court. There is a broad line drawn between the claims that were made by Evans with the efforts to induce Evans to act and his failure to act, and the action of the court in rendering the decisions. If these things were true they were facts hat the public had a right to be informed about, and it cannot be said since the article must be construed most favorably for the respondent that he charged corruption or that the decisions were the result of venal influence. The only cases the article refers to are the elections cases that had then been dcided and the opinions in which had been given out by the court and were published. We submit that this article, since it did not relate to pending cases, and could not interfere with the due administration of justice in connection with such cases, could not be made the basis of contempt proceedings.

THE FOURTH ARTICLE.

The fourth article was published in the DENVER TIMES on Wednesday, June 28, . It is an editorial written by respondent and is as follows:

"THE PRESS AND THE COURTS."

"Thinking men long ago concluded that if this country shall ever lose its liberties, it will be through the judiciary. The encroachments of the courts upon the fundamental principles of popular government have been rapid and marked, and in some states they are proceeding with accelerated speed.

The power conferred upon the courts to undo the work of both legislatures and the people is the kernel of the danger. This, backed by the power to punish whoever may criticise them in an unfriendly spirit, as for contempt, make them antagonists of the people when they assume to assail their rights, not only formidable, but almost unconquerable. They are the last resort for whatever comes within their jurisdiction, and if they are without jurisdiction they may usurp it. There is no appeal from any wrong they commit except TO THE PEOPLE themselves. The judiciary is the one department of government that may indict, try and convict for real or imaginary offenses against what it is pleased to term its "dignity." The court is not only *"imperio in imperium"* but it is "THE STATE" itself, the only higher tribunal being "THE PEOPLE."

And what is a court? It is an organization of men —plain ordinary men, with the weaknesses and ambitions of other men. A man who is weak, vain or corrupt before he reaches the bench will in all probability be weak, vain and corrupt on the bench. Usually the selection of judges is the people's work, but not infrequently public affairs so shape themselves that men without conscience and without private ends to serve succeed in foisting tools upon the bench, and when there their record is one of servility and entails reproach.

The power, the almost unlimited power, held by courts, should cause them to approach its exercise with chastened hearts and nobility of mind. When the

matters to be determined affect the people as a whole, or some deliberate act of the people constitutionally performed or expressed nothing but the most solemn sense of the highest duty should lead courts to overturn what has been done. Great courts, and courts not so great, but nevertheless conscientious, have always moved along these lines; and great courts and conscientious courts never leave the public in doubt as to the cleanness of their hearts and uprightness of their motives in the performance of duty.

If there is one department of the government more than another that should receive the scrutiny of the public press it is the judiciary. The tremendous power it possesses for good or evil; its unrestrained and unrestrainable power except by The People, all demand that upon proper occasions and especially when dealing with matters of grave public concern, it should be frankly, fairly, but above everything else FEARLESSLY criticised—not in a spirit of personal aniomsity, but having in mind the highest good of the state and for the presenvation of the true dignity and influence of just and honorable courts. The journal is cowardly and a traitor to the cause of justice and the people which conscious that grave wrongs have been committed by courts, and especially the highest courts, will through fear of prison bars or heavy fine, or both, remain silent or criticise the wrong with less than manly frankness.

By concert, the two corporation papers, of Denver, —the Post and the Republican—have demanded that the editor of this paper shall be prosecuted and imprisoned for dealing with certain doings of judges during the past year and with the Supreme Court's recent charter decision. The occurrences of the past year in which judges have been the principal actors —using their tremendous power against men and parties and measures—have seemed to the Times to merit the fullest criticism and that no reasonable censure could be too severe.

With the feelings that the course of these judges aroused in the breast of its editor, the wonder seems to him now that the criticism the Times contained have been so moderate and reserved. If all the doing of last winter—the relation and connection of certain judges with the legislature and with the heads of great

corporations, and with the appointing power of the State could be uncovered the public would be astounded.

The course of the Post and Republican is merely the will of their corporation owners—the Republican always, the Post for the present in return for the price paid for its services. Doubtless Mr. Evans and Mr. Cheesman and Mr. Hearne feel that imprisonment or fine will either weaken the influence of the Times or palsy the hand of its editor. The co-operation of the Republican and the Post, pursuing precisely the same line, using exactly the same argument, making identically the same demands show the corporation source of the orders and the corporation service in which they are engaged. But the Times mildly but firmly informs these corporation mouthpieces that the Times can as well be edited with its editor behind the bars as from the editorial room of the paper, and perhaps the more effectively arouse the public to its danger.

If there could be in fact an investigation! If there could be a tribunal before which under proper process no man, high or low, could shield himself from the probe of the examiner! If the heads of the great corporations and those whom they have elevated could be forced to tell the story of last winter's saturnalia of crime under the guise and pretense of the law, the temple they have created would tumble about their ears and the country would stand appalled."

This article discloses the views of the respondent on the tremendous powers possessed by the courts of the country and the spirit in which they should be exercised. We feel that this honorable court will concur in those views. It also expresses his views about the relation of the press to the courts and the duty of both to the public. We hope that the views thus expressed will not meet with disfavor at the hands of this exalted body. Passing from that the editorial discloses the fact that the other Denver papers had been demanding that the respondent be prosecuted and imprisoned for the articles he had published and in referring to that fact it declares that "The occurrences of the past year in which judges have been the principal actors, using their tremendous power against men

affidavit upon which he was cited, to be false, scandalous and defamatory," and which " were intended to degrade the said court and excite public prejudice and odium against it, and were unlawful interferences against it, and were unlawful interferences with the proceedings of said court."

In the course of the opinion, the court cites part of the testimony from the record showing that on the hearing of the contempt, respondent's attorney asked to call witnesses to prove *that the publication in the Bee was in point of fact true.* The court declined permission stating that he would rely wholly on the stenographer's notes, and that he would not allow the matter to degenerate into a controversy, as to the correctness of the reporter's notes.

As to this—the gist of the case—the Supreme Court said:

> That the result of this action of the court in thus requiring petitioner in effect to submit his defense upon the evidence for the people, was in substance and effect to deprive petitioner of the right to be heard in his defense, is, we think obvious. It is contended by defendant that even if the action of the court was wrong, it was error merely, which cannot be reviewed on certiorari; that the court having jurisdiction of the person and subject matter, the mere method in which it exercised such jurisdiction cannot be enquired into in this proceeding which looks only to the question of jurisdiction. If the premise were correct the conclusion would undoubtedly follow, *but with the view that the action involved no more than mere error we cannot coincide. It was error certainly, but it was more than that. It was a transgression of a fundamental right guaranteed to every citizen charged with an offense or whose property was sought to be taken, of being heard before he is condemned to suffer injury.* Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in methods of procedure, which has the effect to deprive one of a constitutional right *is as much an excess of jurisdiction as where there exists an inceptive lack of power.*" "The substance and not the shadow determines the validity of the exercise of the power."

Postal Tel. etc. Co.. vs. Adams, 155 U. S., 689, 698.

> "While the writ of certiorari is not a writ of error, it is nevertheless as suggested in Schwarz vs. Superior Court, 111 Cal., 112, *a means by which the power of the court in the premise can be inquired into;* and for this purpose the review extends not only to the whole record of the court below, but even to the evidence itself, when necesary to determine the jurisdictional fact."

Following this the opinion continues:

> *Contempt of court is a specific criminal offense* (citing cases) and a party charged therewith, although the proceding is more or less summary in character, *has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt,* as he would against a charge of murder or any other crime.

The court then quotes from State vs. Orleans Civil Judges, 32 La., Am. 1256, 1262, the following:

> The charge of contempt should not in any case be followed by sentence in imprisonment unless after a rule to show cause has been granted and the party defendant therein heard and permitted to offer evidence and argument.

And it is held that anything less than that would constitute "a want of due process of law," or a proceeding not in accord with the "law of the land," rendering a judgment void.

I need not discuss the alleged absurdity of a court being asked to try itself—as is suggested by the attorney general I infer from the opinion in ex rel. vs. Shepperd (supra), the court would have ordered a commission or a master to hear the testimony and decide, but whether that would be a proper course need not now be decided. One thing is certain: when a newspaper publishes a libellous article about a judge and on citation the offender pleads the truth of the charges, if the charges were of sufficient importance in the first instance to justify the citation of the publisher, they were sufficiently im-

portant to cause the court either to suspend proceedings or dismiss the charge and bring his suit for civil damages, or cause a prosecution of the offender for criminal libel. The mere convenience of a judge or his wounded feelings cannot justify the sacrifice of one of the fundamentals of our republican government—the freedom of the press, and that the truth absolves a publisher from all legal punishment.

DUE PROCESS OF LAW

The question of due process of law was fully discussed in the first brief of plaintiff in error. There is little I care to add to it. This court has repeatedly held that it has "never attempted to define with precision 'due process of law'" but that "there are certain immutable principles of justice which were in the very idea of free government which no member of the Union may disregard."

Holden vs. Hardy, 169 U. S., 366, 389.

In Davidson vs. New Orleans, 96 U. S., 97, the court (Mr. Justice Miller delivering its opinion) recognized that no precise definition could or should be given of the words, and held that the annunciation of the principle which governs in each case as it arises is the better mode of arriving at a sound decision.

May I not with reason urge that in the proceedings before the Supreme Court of Colorado there were immutable principles of justice that inure in the very idea of free government which Colorado, a member of the Union, may not disregard? If the things done in this case must go on unrestrained then a Republican form of government no longer exists in Colorado, and due process of law and the equal protection of the law has degenerated into a farce.

Can it be held that the accused has had "the equal protection of the law" under the following circumstances? The Supreme Court of his State has undeviatingly held since its admission into the Union, now more than thirty years ago,

and in a dozen cases, that it was impossible for a Colorado court to acquire jurisdiction for any purpose in a case of constructive contempt without an affidavit or verified information as the foundation of proceedings in which it would appear from the facts stated that a contempt had in fact been committed. With this unswerving line of its own decisions, the same court in the case at bar—having shown on motion of the attorney general its adherence to the rule by permitting the information to be verified, nunc pro tunc, now assumes the ground that a verification is not necessary and never has been. Is it not reasonably certain that this change of front arose from its anxiety to punish the accused and with a strong belief that no court would review its decision?

Much space is occupied in the effort of the attorney general to establish that plaintiff in error has had notice and had the opportunity to be heard, and therefore he has no legal cause of complaint. As well might an accused person who sought the intervention of this court to stay a conviction and without due process of law be told, "the attorney general filed an information against you (although under the constitution of his state the attorney general had been deprived of authority to prosecute criminal offenses—that function having been devolved upon the district attorney) and you were permitted to plead not guilty, although the court declined to hear testimony in support of your plea, and although, as, under the statutes of Colorado, every information must be verified; therefore why should you be heard to complain, and why should this court interfere?" Yet, there is no room to doubt that should a state Supreme Court hold in the face of a statute requiring an information to be verified that a conviction upon an unverified information should stand, and should said court hold that the trial court committed no error in preventing the accused from putting in evidence in support of his plea of not guilty—in either event this court would promptly hold that the accused had been deprived of his liberty without due process of law—and relieve him from the conviction.

Plaintiff in error respectfully submits, therefore, that if the judgment of the court shall be carried out he will be deprived of his liberty and property without due process of law; and he will have been denied the equal protection of the law; for each of the three grounds he has heretofore urged. He therefore asks that the judgment of which he complains be reversed and for all other proper relief.

Respectfully submitted,

THOMAS M.. PATTERSON,

pro se.